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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1113

CHICOT LAND COMPANY, INC.,

Petitioner,

v.

ALLEN EUGENE KELLY, SR. and
GARLAND WAYNE KELLY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE OF ALLEN EUGENE KELLY, SR. and GARLAND WAYNE KELLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Respondents' opposition to the Petition for Writ of Certiorari prayed for herein respectfully represents:

OPINION BELOW

The opinion of the trial court is not officially reported, but is appended to the Petition for a Writ of Certiorari.

The opinion of the United States Court of Appeals for the Fifth Circuit, delivered August 28, 1973, is officially reported at 485 F.2d 520; the denial of rehearing en banc is reported at 486 F.2d 1403.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Respondents disagree with the Petitioner's statement of the questions presented on the grounds that the Petitioner's statement of the questions presented not only fails to take account of, but also assumes the non-existence of, the salient facts upon which the lower courts grounded their decision in favor of maritime jurisdiction. These salient facts, which in the statement of questions presented in the Petition are assumed not to exist, are: interference with the Kelly boat's right to navigation by the firing of shots across its bow, interference with navigation of the Kelly boat by tortious damage to its hull, interference with navigation of the Kelly boat by tortious damage to its motor, interference with navigation of the Kelly boat by wounding its pilot, a tortious gunshot wound to a passenger of the vessel, and, finally, the fact that the vessel was at the time of the casualty being used for flight in extremis across the Mississippi River.

It is respectfully submitted that the only question presented for review in this case is one readily answerable in the affirmative, the question being whether a marine casualty involving all of the above factors occurring while the vessel was in navigation on the Mississippi River involves a maritime tort.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct except that it does not include the fact that the first shot was across the bow of the Kelly boat and that the ensuing fire from the high-powered rifles which wounded two of the Kellys also made holes in the boat's hull[1] and partially de-commissioned the boat's motor[2] while the Kellys were in flight across the navigable waters.

ARGUMENT

It is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari because:

A. The fact that the casualty encompassed an actual interference with the Kelly vessel's right of navigation upon navigable waters, actual and disabling damage to the vessel, a use of the vessel for flight, from harm, across navigable waters and a wounding of the vessel's pilot and passenger, clearly brings the marine casualty in the instant case within the realm of maritime tort.

B. The decision by the trial judge affirmed by the appellate court that the composite facts of the instant case involve a significant relationship to traditional maritime activity is correct, or at the very least is not clearly erroneous.

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[1] "[H]oling the boat" is the phraseology used by the Fifth Circuit, 485 F.2d at 521.

[2] For an account of the disabled vessel's traveling across the Mississippi River, see the record testimony of Allen Eugene Kelly, Jr., who piloted the boat after his father's ankle was shattered by the gunfire.

C. The decision of the United States Court of Appeals for the Fifth Circuit in this case is consistent with this Court's decision in *Executive Jet*.

D. The cases cited in the Petition for a Writ of Certiorari in this case as conflicting with the appellate decision in this case are distinguishable and not in conflict with it.

E. Reason dictates that the admiralty should retain jurisdiction over such controversies.

I.

THE FACT THAT THE CASUALTY ENCOMPASSED AN ACTUAL INTERFERENCE WITH THE KELLY VESSEL'S RIGHT OF NAVIGATION UPON NAVIGABLE WATERS, ACTUAL AND DISABLING DAMAGE TO THE VESSEL, A USE OF THE VESSEL FOR FLIGHT, FROM HARM, ACROSS NAVIGABLE WATERS AND WOUNDING OF THE VESSEL'S PILOT AND PASSENGER, CLEARLY BRINGS THE MARINE CASUALTY IN THE INSTANT CASE WITHIN THE REALM OF MARITIME TORT.

The Kelly boat is a vessel. 1 U.S.C. 3 defines a vessel as "every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water."[3]

Certainly a vessel the size and power of the Kelly vessel has a right of navigation on the navigable waters. Navigational rights of even rafts and rowboats, and of vessels the size of the Kelly vessel, are protected in the Navigational Rules of the Road, which, though of the

[3] Other federal statutes give the same definition except that they expressly exclude seaplanes. See 33 U.S.C. 144(c)(i); 46 U.S.C. 1452.

admiralty and historical in concept, have become codified in federal statutes.[4]

The Inland Rules, now 33 U.S.C. 151-232, were the rules applicable to the area in which the instant casualty occurred. That the rules apply to small vessels, even rowboats, is clear.[5]

Additionally, navigational rights of such vessels are extensively federally protected in the Motorboat Act, 46 U.S.C. 526, and the Federal Boat Safety Act, 46 U.S.C. 1451, *et seq.*

In the Motorboat Act, a motorboat is defined to include every vessel propelled by machinery and not more than sixty-five feet in length (except tugs and towboats).[6] The act classifies motorboats relative to length; Class A. is motorboats less than sixteen feet in length.[7]

The Motorboat Act specifies lighting,[8] lifesaving equipment,[9] fire fighting equipment,[10] flame arresters for carburetors[11] and ventilation for engines[12] for all motorboats.

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[4] 33 U.S.C. 1-360.

[5] For example, 33 U.S.C. 191(f) provides that when proceeding in fog all rafts and other watercraft "*navigated* by hand power, horsepower or by the current of the river shall sound the blast of a fog horn or equivalent signal at intervals of not more than one minute." (Emphasis added.)

[6] 46 U.S.C. 526.

[7] 46 U.S.C. 526(a).

[8] 46 U.S.C. 526(b).

[9] 46 U.S.C. 526(e).

[10] 46 U.S.C. 526(g).

[11] 46 U.S.C. 526(l).

[12] 46 U.S.C. 526(j).

This federal act specifically regulates the *operation* of all motorboats. 46 U.S.C. 526(1) provides that no person shall operate any motorboat in a reckless or negligent manner, and 46 U.S.C. 526(m) makes it a federal crime to operate any motorboat in a reckless or negligent manner so as to endanger the life, limb or property of any other person.

The Federal Boat Safety Act, 46 U.S.C. 1451, *et seq.*, in its declaration of policy and purpose declares it to be the policy of Congress to create the regulatory authority concerning the use of boats.[13]

The Federal Boat Safety Act specifically provides for federal *preemption*. 46 U.S.C. 1459 provides:

> § 1459. Federal preemption in the issuance of standards
>
> Unless permitted by the Secretary under section 1458 of this title, no State or political subdivision thereof may establish, continue in effect, or enforce any provision of law or regulation which establishes any boat or associated equipment performance or other safety standard, or which imposes any requirement for associated equipment, except, unless disapproved by the Secretary, the carrying or using of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, which is not identical to a Federal regulation issued under section 1454 of this title.

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[13] 46 U.S.C. 1451. In that act, boats are defined to include any vessel manufactured or used primarily for non-commercial use, and vessels are defined to include every description of watercraft other than a seaplane on the water used or capable of being used as a means of transportation on water. 46 U.S.C. 1452.

Further, the Federal Boat Safety Act affirms that it is a violation of federal law for a person to operate a vessel in a negligent manner.[14]

The act also specifically treats civil liability. It provides as a matter of federal law that an operator of a vessel involved in a collision, accident or other casualty shall render practical and necessary assistance to others involved and shall not be held liable for any civil damages as a result of the rendering of such assistance or for any act or omission in providing for same.[15]

Federal regulations relative to the operation of pleasure boats have been promulgated for enforcement by the United States Coast Guard.[16] These regulations are detailed even to the extent of setting out formulas for determining the seating capacity and weight capacity of outboard motorboats.[17]

Thus, from the federal statutes, including the admiralty navigational rules, and from federal regulations, it is abundantly clear that the federal laws and the admiralty are applicable to transportation across the navigable waters of the United States by a vessel such as the Kelly

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[14]46 U.S.C. 1461(d).

[15]46 U.S.C. 1465.

[16]33 C.F.R. 179, *et seq.*; see also the Coast Guard pamphlet entitled "Does a BOSDET Bite?" (CG-427) in which the activities of "BOSDETS" (U.S. Coast Guard Boating Safety Detachments) are explained. One of the examples of negligent operation of recreational craft listed in the pamphlet is "failure to observe the Rules of the Road;" see also the "U.S. Coast Guard Boating Safety Training Manual" published July 1973 (U.S. Government Printing Office: 1973 728-539/692) and see also the "U.S. Coast Guard Boarding Manual" (CG-253).

[17]33 C.F.R. 183.31, *et seq.*

vessel. See also, for example, *Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953), an admiralty case involving a collision between two motorboats in the Ohio River.

The transportation, by vessel, of persons across navigable waters being an admiralty and federally protected right, tortious interference upon navigable waters with a vessel's navigation and right to navigation in a maritime tort.

Accordingly:

(a) Shooting across the bow of a vessel as an overforceful demand for it to stop is an interference with its right to navigation, and a maritime tort, and

(b) Tortious physical damage to a vessel (by shooting holes into a vessel's hull, "holing the vessel"[18]) while it is navigating is an interference with its navigation *and* right to navigation, and a maritime tort, and

(c) Shooting into a vessel's motor, damaging it, and thereby rendering it less than fully operable, is an interference with navigation, and a maritime tort, and

(d) The tortious wounding of a vessel's pilot is an interference with its navigation and right to navigation upon navigable waters, and a maritime tort.

Each of the above, alone, is a maritime tort; the composite of all the above occurring in one casualty certainly constitutes a maritime tort.

The above factors all being present in the instant case, further factors and arguments illustrating that a maritime tort is involved would appear unnecessary. But, bringing coals to Newcastle, the activity of the vessel and the fact

[18]"Holing the vessel" is the phrase used by the Court of Appeals in this case.

that a passenger, as well as the pilot, was shot are additional factors showing maritime jurisdiction, as is seen in the discussion below.

II.

THE DECISION BY THE TRIAL JUDGE AFFIRMED BY THE APPELLATE COURT THAT THE COMPOSITE FACTS OF THE INSTANT CASE INVOLVE A SIGNIFICANT RELATIONSHIP TO TRADITIONAL MARITIME ACTIVITY IS CORRECT, OR AT THE VERY LEAST IS NOT CLEARLY ERRONEOUS.

At the trial court level in this case, the argument was made that locality alone is the test for maritime jurisdiction. But the trial judge rejected that argument and ruled that the test for admiralty jurisdiction required, in addition to locality, a maritime connection. The trial judge then found as a matter of fact and as inference drawn from facts that there was in the instant case sufficient maritime connection to support admiralty jurisdiction. The judge found that the boat's transportation of these parties under the circumstances of this case provided a sufficient maritime connection.

The maritime transport away from the island and across the Mississippi River was vitally involved in the incident. Perhaps it could be argued that the shooting would not have occurred had not the maritime transport away from the island been under way at the particular moment, and, on the other hand, it can be argued that the maritime transport away from the island saved the lives, if not the limbs, of the Kellys.

At the time of the casualty the boat was being used to transport persons, in extremis, toward safety across navigable waters. But the vessel was damaged by gunshot, the navigation impaired and the pilot wounded.

Moreover, in the casualty one of the passengers in the vessel was wounded. Tortious injury of passengers and other persons aboard vessels in navigable waters is certainly a matter within admiralty jurisdiction. See, for example, *Kermerec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1958); *Rowe v. Brooks*, 329 F.2d 35 (4 Cir. 1964); *Fidelity & Casualty Co. v. C/B Mr. Kim*, 345 F.2d 45 (5 Cir. 1965); *Judy v. Belk*, 1966 A.M.C. 1854.

The United States Court of Appeals for the Fifth Circuit, in affirming, reiterated that "in this case admiralty jurisdiction does not arise from the bare facts that the Kellys' injury was consummated on navigable waters,"[19] 485 F.2d at 525, and particularly noted that:

> The party most seriously injured was the pilot, the person responsible for the safe navigation of the vessel. The vehicle involved was a boat, not an automobile or airplane, whose function was transportation across navigable waters, a traditional role of watercraft. The other instrumentalities involved—firearms—and the injuries they caused, are not so inherently indigenous to land as to preclude any maritime connection. Additionally, upholding maritime jurisdiction does not stretch or distort long-evolved principals of maritime law. Admiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters.
>
> Policy militates toward admiralty jurisdiction in this case. The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the

[19] 485 F.2d at 525.

> hazards of waterborne transportation. Rifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the furnish remedies to those aboard the vessel and injured by that conduct. Regardless of whether the Kellys had available remedies in state courts, the federal interest in protecting navigation on the Mississippi River overrides any considerations of federal-state comity or conflicts of interest.[20]

It is respectfully submitted that it is perfectly clear from the circumstances of this case that there is a very substantial maritime connection and a very strong relationship to traditional maritime activity, bringing the instant case within the admiralty jurisdiction of the court.

But even if, arguendo, it were not perfectly clear that the composite of the circumstances of this case provides a sufficient maritime relationship, it is at least a matter over which reasonable minds could differ. It is patent that at least the trial judge and two members of the United States Court of Appeals for the Fifth Circuit believe that, as a factual matter, there was indeed in the composite circumstances of this case a sufficient relationship to traditional maritime activity to come within the admiralty jurisdiction.

In gray areas or borderline cases in which there is a close question as to whether the composite circumstances

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[20]485 F.2d at 525, 526.

of a given case bring it within the maritime law, the finder of fact must have a role.[21] His decision as to these facts and inferences drawn from facts should not be overturned unless clearly erroneous. The scope of review of findings by a trial judge sitting in admiralty is the same as the scope of review of jury findings. *McAllister v. U.S.*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954).

In close questions, the finder of fact necessarily has a role in determining whether, in addition to locality, there is in a given case a sufficient relationship to traditional maritime activity to come within admiralty jurisdiction. Surely no court would dogmatically and categorically say, without reference to any other factors or circumstances, that a vessel fifteen feet long can be within the admiralty jurisdiction but one fourteen feet long can not, or that a boat used to catch sailfish for sport off of Cuba is jurisdictionally different from a yacht underway from Nassau, or that the use of a fifteen foot boat with seventy-five horsepower motor such as the Kellys' in the Mississippi River to provide food for the table and freezer is different from the use of an identical boat to catch sailfish between the Florida Keys and the coast of Cuba or to transport refugees in flight, in extremis, from Cuba to the Florida Keys.

In close cases, there simply can not be categorical rules that admit of no weighing of factors and circumstances and no role for the finder of fact.

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[21] It is the rule rather than the exception for finders of fact to make the key determinations from facts and inferences drawn from facts in close cases of maritime jurisdiction. See *Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958); *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1956); *Roper v. U.S.*, 368 U.S. 20, 82 S.Ct. 5, 7 L.Ed.2d 1 (1961).

After trial, the finder of fact in the instant case found the body of water involved, the shooting, the flight, the use of the vessel, the interference with the vessel's navigation, the wounding of the pilot and the passenger, and the damage done to the vessel, as a composite, to constitute a sufficient relationship to traditional maritime activity to come within the admiralty jurisdiction. Certainly, the factual finding was not clearly erroneous.

III.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THIS CASE IS CONSISTENT WITH THIS COURT'S DECISION IN EXECUTIVE JET.

In *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 209, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), this Court held that "there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States."[22]

In arriving at the conclusion "that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation cases," this Court discussed cases involving injuries to swimmers, surfboarders and water skiiers, apparently disapproving the decisions in which courts adhered to a mechanical application of the strict locality rule sustaining admiralty jurisdiction when both a connection with commerce and a connection with navigation were absent and, on the other hand, apparently approving the decisions of courts holding that in addition to locality there must also be a maritime nexus, some relationship

[22]93 S.Ct. at 507.

involving navigation or commerce on navigable waters.[23] This Court cited with approval *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (1967) and reiterated the *Chapman* test to be:

> . . . that admiralty jurisdiction over torts may properly be invoked only when two criteria are met: (1) the locality where the alleged tortious wrong occurred must have been on navigable waters; and (2) there must have been a relationship between the wrong and some maritime service, navigation or commerce on navigable waters.[24]

The instant case more than satisfies the criteria. As illustrated throughout this brief, this case involves a most serious interference and involvement with the Kelly vessel's navigation.

As seen by this Court's reference to a maritime nexus as "some relationship between the tort and traditional maritime activities, involving navigation or commerce,"[25] the test is fulfilled by there being an involvement with either navigation or commerce.

Navigation is not to be confused with requirements for interstate or foreign commerce. The admiralty jurisdiction of the courts is conferred in Article 3, Section 2 of the Constitution and is totally independent of the powers of Congress to regulate commerce. See, for example, *The Belfast*, 7 Wall. 624, 19 L.Ed. 266 (1869), and see *Levinson v. Deupree, supra*, where in this Court interference with navigation alone sufficed for admiralty jurisdiction. See also *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct.

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[23] 93 S.Ct. at 498.

[24] 93 S.Ct. at 496.

[25] 93 S.Ct. at 498.

291, 87 L.Ed. 363 (1943) in which this Court applied the traditionally admiralty limitation of liability laws to a yacht.

Respondents show that the tort at issue may also be deemed an interference with commerce. Though no dollars and cents were expected to change hands as a result of the Kelly venture on the day in question, the Kellys were using, by right, a federally protected commercial waterway. The manufacture, service and supply of recreational boating are commercial, and such commercial activities depend upon safe navigational use of the navigable waters, free from snipers and other such persons who would endanger the lives and vessels of the persons using the waterways.[26] The United States Court of Appeals for the Fifth Circuit correctly stated in reference to this case:

> The admiralty jurisdiction of federal courts stems from the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation. Rifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct.[27]

Thus, if involvement with commerce was necessary for admiralty jurisdiction, the instant case would encompass a sufficient involvement.

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[26]The hazard to commerce created by the shots and the partially disabled vessel was no less a hazard than would be a partially sunken yacht in the Mississippi River. Cf. *The Fred Schlesinger*, 71 F. 747 (D.C. N.Y. 1896).

[27]485 F.2d at 526.

But as illustrated earlier in this argument, even if this case had no involvement with commerce the maritime circumstances of this case and the interference with the Kelly vessel's navigation amply fulfill the most demanding test mentioned in *Executive Jet* as possibly being applicable to non-aviation cases.

In the instant case, the trial judge and the United States Court of Appeals for the Fifth Circuit applied the most demanding test set out in *Executive Jet*, ruling that it was necessary for there to be a sufficient traditional maritime activity in addition to maritime locality for there to be admiralty jurisdiction, and *then found* that the circumstances of the instant case fulfilled the rule.

A fortiori, since the most demanding test found in *Executive Jet* is fulfilled in the instant case, the holding in the instant case does not conflict with *Executive Jet*.

IV.

THE CASES CITED IN THE PETITION FOR A WRIT OF CERTIORARI IN THIS CASE AS CONFLICTING WITH THE APPELLATE DECISION IN THIS CASE ARE DISTINGUISHABLE AND NOT IN CONFLICT WITH IT.

If the instant case were a swimmer injury case, a surfboard injury case or a water skiier case, the point would be at issue, and the exercise would be upon us. At issue would be the designation of the lowest limit of admiralty jurisdiction in non-aviation cases, cases which, on the one hand, do not involve those non-waterway relegated vehicles, airplanes, but do, on the other hand, involve a water relegated injury with no additional factors. This Court might then rule categorically that injuries to swimmers are not maritime torts, or, contra-

wise, rule that the finder of fact could consider the composite of the factors in determining whether a given swimmer injury is a maritime tort. For example, an independently caused injury befalling a female swimmer who had leapt from a yacht in international waters to escape a rapist might by some finder of fact be found to be a maritime tort within the admiralty jurisdiction, if this Court, when the issue is presented to it, does not make a categorical pronouncement adverse to swimmers.

But the instant case is not a case that puts at issue the lowest limits of admiralty jurisdiction in non-aviation cases. This is not an injured swimmer case, an injured surfboarder case, nor an injured water skiier case.

The cases cited in the Petition for a Writ of Certiorari in this case as conflicting with the appellate decision in this case are distinguishable and not in conflict with it because the cases so cited are all cases involving injuries to swimmers, surfboarders or water skiiers.

None of the cases so cited involve a marine casualty with *any* of the instant case's salient factors–interference with the right to navigation by shots across the bow–interference with navigation by damage to the hull–interference with navigation by impairment, by damage, to the motor–interference with navigation by wounding of the pilot–gunshot wound to a passenger–vessel being used for flight, in extremis, across the Mississippi River.

Because the instant case has ample independent grounds for admiralty jurisdiction whereas the cases cited in the Petition for Writ of Certiorari do not, the cases cited in the Petition are distinguishable and inapposite.

V.

REASON DICTATES THAT THE ADMIRALTY SHOULD RETAIN JURISDICTION OVER SUCH CONTROVERSIES.

The admiralty navigational rules, the federal statutes and the federal regulations permeate the activities and very being of all vessels on the federal waters, specifically including vessels of the type involved in the instant casualty.

An argument that the federal admiralty courts should not have jurisdiction to apply these "tailor-made-for-small-boats" federal regulations and statutes (including the admiralty navigational rules and the redresses from civil liability such as the one given to rescuers in 46 U.S.C. 1465) is patently untenable.

Moreover, the admiralty courts have uniformly and consistently recognized interference with navigation of such vessels to be maritime torts. See, for example, *Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953); *Rowe v. Brooks*, 329 F.2d 35 (4 Cir. 1964); *Salaky v. Atlas Barge No. 3*, 208 F.2d 174 (2 Cir. 1953) and *Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9 Cir. 1973).

Petitioner's argument based upon the premise that the shooting of the Kellys and their boat in the instant case had no effect on navigation is a futile attempt at begging the question. It is absolutely undeniable that the navigation of the Kelly vessel was affected. The jurisprudence and the federal statutes which have been discussed in this writing make it absolutely clear that the navigation and right to navigation of vessels of the size of the Kellys' is the subject of federal concern and a proper subject of the admiralty.

In a nutshell, the reason for not granting the Petition for Writ of Certiorari in this case is:

This case simply isn't the swimmer, surfboarder, or water skiier case that the Petition for Writ of Certiorari implied that it is. This is not the case with which to probe the lowest limit of admiralty jurisdiction; this case has ample independent grounds for admiralty jurisdiction and, thus, a probe for those lowest limits through this case would be a dicta exercise. Soon enough there will come to this Court a swimmer or surfboarder or water skiier case, and give this Court the appropriate opportunity to decide whether there exists some magic line, some thirty-eighth parallel, below which the admiralty may not go. But this case, with its ample independent grounds for admiralty jurisdiction, does not place any controversial questions at issue.

CONCLUSION

It is respectfully submitted that the Writ for Certiorari prayed for should be denied because the casualty at issue in the instant case encompassed actual interference with the Kelly vessel's right of navigation upon navigable waters, actual and disabling damage to the vessel, a use of the vessel for flight *in extremis* across navigable waters and a wounding of the vessel's pilot and a passenger. The Writ should be denied because the finding upon trial that the composite facts of the case involve a significant relationship to the maritime was correct, or at least not clearly erroneous, and presents no novel or otherwise appropriate issue for the granting of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Philip E. Henderson, one of the attorneys of record for Allen Eugene Kelly, Sr. and Garland Wayne Kelly, Respondents herein, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing Response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the following persons:

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This day of , 1974.

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